



UNIVERSITY
OF
JOHANNESBURG

COPYRIGHT AND CITATION CONSIDERATIONS FOR THIS THESIS/ DISSERTATION



- Attribution — You must give appropriate credit, provide a link to the license, and indicate if changes were made. You may do so in any reasonable manner, but not in any way that suggests the licensor endorses you or your use.
- NonCommercial — You may not use the material for commercial purposes.
- ShareAlike — If you remix, transform, or build upon the material, you must distribute your contributions under the same license as the original.

How to cite this thesis

Surname, Initial(s). (2012). Title of the thesis or dissertation (Doctoral Thesis / Master's Dissertation). Johannesburg: University of Johannesburg. Available from: <http://hdl.handle.net/102000/0002> (Accessed: 22 August 2017).

**A COMPARISON BETWEEN THE COFI BILL AND THE FAIS ACT IN
LIGHT OF THE TCF REQUIREMENTS**

by

Tegan Sham

Submitted for the degree

MAGISTER LEGUM (LLM)

in

COMMERCIAL LAW

in the

FACULTY OF LAW

at the

UNIVERSITY OF JOHANNESBURG



UNIVERSITY
OF
JOHANNESBURG

SUPERVISOR: PROF D MILLARD

ACKNOWLEDGMENTS

This minor dissertation became a reality with the kind support and help of many individuals. I would like to extend my sincere thanks to all of them.

Foremost, I would like to thank my supervisor, Prof. D Millard, for all your assistance and guidance with my study. You have been invaluable during this process.

To my friends, Angie and Leilani, a huge thank you to you both for your endless words of reassurance and all your time spent proof reading my study, I truly appreciate it.

I would like to thank my parents, Paul Sham, Elda Sham, as well as my dear sister, Ava Sham for their unconditional love and encouragement.

Lastly but most certainly not least, I would like to express my sincere gratitude to my husband, Yorgo Yiannakis. Thank you for your endless support and love. I am so grateful to have had you in my corner cheering me on.

Without the support, love, patience and guidance from all of you, none of this would be possible.

List of Abbreviations:

CPA	Consumer Protection Act
COFI	Conduct of Financial Institutions
FAIS	Financial Advisory and Intermediary Services
FSB	Financial Services Board
FSCA	Financial Sector Conduct Authority
FSP	Financial Service Provider
FSR Act	Financial Sector Regulation Act
GCC	General Code of Conduct
LTIA	Long-Term Insurance Act
LT PPR	Long-Term Insurance Act Policyholder Protection Rules
PA	Prudential Authority
PPR	Policyholder Protection Rules
STIA	Short-Term Insurance Act
ST PPR	Short-Term Insurance Act Policyholder Protection Rules

UNIVERSITY
OF
JOHANNESBURG

Contents

CHAPTER 1	7
INTRODUCTION AND RESEARCH QUESTION	7
1.1. Introduction	7
1.2. Research Question	9
1.3. Research Objective	9
1.4. Research Methodology	10
1.5. Proposed Chapter Outline	10
1.6. Limitation of Study	11
CHAPTER 2	12
BACKGROUND TO THE REGULATORY FRAMEWORK OF THE INSURANCE INDUSTRY IN SOUTH AFRICA	12
2.1. Introduction	12
2.2. Subordinate legislation	12
2.3. The need for reform	13
2.4. The FSCA	14
2.5. Evaluation	14
CHAPTER 3	16
ANALYSIS OF THE FAIS ACT	16
3.1. Introduction	16
3.2. Layout of the FAIS Act	17
3.2.1. Introductory Provisions	17
3.2.2. Chapter 1: Administration of Act	18
3.2.3. Chapter 2: Authorisation of Financial Service Providers	18
3.2.4. Chapter 3: Representatives of Authorised Financial Service Providers	18
3.2.5. Chapter 4: Codes of Conduct	19
3.2.6. Chapter 5: Duties of Authorised Financial Service Providers	19
3.2.7. Chapter 6: Enforcement	19
3.2.8. Chapter 7: Miscellaneous	20
3.3. Layout of the General Code of Conduct	20
3.3.1. Part 1: Introductory Provisions	21
3.3.2. Part 2: General Provisions	21
3.3.3. Part 3: Information on Product Suppliers	22
3.3.4. Part 4: Information on Providers	22
3.3.5. Part 5: Contacting of Client	22

3.3.6.	Part 6: Information about Financial Service.....	22
3.3.7.	Part 7: Furnishing of Advice	23
3.3.8.	Part 8: Custody of Financial Products and Funds	23
3.3.9.	Part 9: Risk Management	23
3.3.10.	Part 10: Advertising and Direct Marketing	24
3.3.11.	Part 11: Complaints.....	24
3.3.12.	Part 12: Termination of Agreement or Business	24
3.3.13.	Part 13: Wavier of Rights.....	25
3.3.14.	Part 14: Short Title and Commencement	25
3.4.	<i>The Policyholder Protection Rules</i>	25
3.4.1.	General	25
3.4.2.	Chapter 1: Interpretation	26
3.4.3.	Chapter 2: Fair Treatment of Policyholders	26
3.4.4.	Chapter 3: Products	27
3.4.5.	Chapter 4: Advertising and Disclosures	29
3.4.6.	Chapter 5: Intermediaries and Distribution	29
3.4.7.	Chapter 6: Product Performance and Acceptable Service.....	30
3.4.8.	Chapter 7: No Unreasonable Post-Sale Barriers	31
3.4.9.	Chapter 8: Administration.....	32
3.5.	<i>General observations on the FAIS Act, GCC and PPRs</i>	32
	CHAPTER 4	34
	EXPLANATION OF THE COFI BILL	34
4.1.	<i>Introduction</i>	34
4.2.	<i>The Development to a New Market Conduct Law: The Policy Approach</i>	35
4.2.1.	Activity-based	35
4.2.2.	Principles-based	36
4.2.3.	Outcome-focused	36
4.2.4.	Risk-based and Proportionate.....	37
4.3.	<i>Layout of the COFI Bill</i>	37
4.3.1.	Chapter 1: Interpretation, Object and Application	37
4.3.2.	Chapter 2: Licensing	38
4.3.3.	Chapter 3: Culture and Governance	39
4.3.4.	Chapter 4: Financial Products	39
4.3.5.	Chapter 5: Financial Services.....	39
4.3.6.	Chapter 6: Promotion, Marketing and Disclosure	40
4.3.7.	Chapter 7: Distribution, Advice and Discretionary Investment Management	40

4.3.8.	Chapter 8: Post-sale Barriers and Obligations	41
4.3.9.	Chapter 9: Safeguarding Assets and Operational Requirements.....	41
4.3.10.	Chapter10: Reporting	41
4.3.11.	Chapter 11: Remedial Actions for Financial Customers	42
4.3.12.	Chapter 12: General Provisions.....	42
4.3.13.	Chapter 13: Final Provisions	42
4.3.14.	Schedules.....	42
4.4.	<i>General Observations of the COFI Bill</i>	42
CHAPTER 5	.....	44
RECOMMENDATIONS	.....	44
CHAPTER 6	.....	46
CONCLUSION	.....	46
BIBLIOGRAPHY	.....	48



CHAPTER 1

INTRODUCTION AND RESEARCH QUESTION

1.1. Introduction

The South African legislature has over the past two years undertaken a massive restructuring in which they not only completely revamped the legislation that governs financial services, but also the actual structure of the regulators.

The background to the insurance industry's history will be dealt with in more detail in the chapter to follow. However, a brief overview into the current legislative and regulatory landscape of the financial services sphere and the reasons surrounding the change will be beneficial to understand the research question at hand.

Previously, the insurance industry was governed by the Financial Services Board (FSB) a creature of statute, which obtained its powers under the Financial Services Board Act.¹ The FSB's scope was a combined focus which included the regulation for both, prudential and conduct matters relating to financial institutions and the provision of financial services, however this scope did not include banks.²

2017 welcomed the introduction of the Financial Sector Regulation Act,³ (FSR Act) which has been the driving force behind the regulatory reform in the financial services industry in South Africa. Along with the introduction of the FSR Act, came the Twin Peaks Model.

The aim of the Twin Peaks Model is to create a more resilient and stable financial system, to ensure consumer protection and appropriate conduct in the financial services sector.⁴ Effectively, what the Twin Peaks Model set out to achieve is to split the former regulator - the FSB's - powers into two peaks, namely the Prudential Authority (PA),⁵ which regulates all prudential matters, as more fully laid out in chapter 3 of the FSR Act,⁶ and the Financial Sector Conduct Authority (FSCA),⁷ which is the dedicated market conduct authority, with a different

¹ 97 of 1990.

² s 28 (n 1).

³ 9 of 2017.

⁴ s 7 of the FSR Act.

⁵ s 31 of the FSR Act establishment of the Prudential Authority.

⁶ s 33 of the FSR Act "The objective of the Prudential Authority is to (a) promote and enhance the safety and soundness of financial institutions that provide financial products and securities services; (b) promote and enhance the safety and soundness of market infrastructures; (c) protect financial customers against the risk that those financial institutions may fail to meet their obligations; and (d) assist in maintaining financial stability."

⁷ s 56 of the FSR Act establishment of the Financial Sector Conduct Authority.

mandate and approach to that of the former regulator, the FSB, which is identified in more detail under chapter 4 of the FSR Act.⁸

Together with the introduction of Twin Peaks came the change in the various statutes that regulates this industry. Previously, the insurance industry was regulated by the Long-term Insurance Act (LTIA),⁹ and the Short-term Insurance Act (STIA).¹⁰

As a result of the introduction of the FSR Act¹¹ and the Twin Peaks Model, new legislation has been introduced into the insurance industry, namely the Insurance Act,¹² and the soon to be promulgated Conduct of Financial Institutions Act,¹³ (COFI).¹⁴ Both these statutes are set to replace the STIA and the LTIA in the near future.

Due to the promulgation of the Insurance Act, all prudential matters governed under the LTIA and the STIA were repealed as at 1 July 2018.¹⁵ Currently all conduct matters are still governed by the LTIA and STIA in the form of the Policyholder Protection Rules (PPRs) until such time as COFI is promulgated, thereafter all conduct matters will be regulated by the latter and the LTIA and STIA will be repealed in their entirety.

As mentioned, the FSCA has become the dedicated authority for conduct matters which has been premised on the Treating the Customer Fairly (TCF) principles to be regulated under the COFI Bill.¹⁶ In performing their functions the FSCA must promote the objective of the Bill.¹⁷ Furthermore, unlike the former FSB's authority, the FSCA's jurisdiction has been increased and its supervisory powers extended to that of banks and services relating to credit and the investments sector.¹⁸

In light of the COFI Bill,¹⁹ coming to the forefront and its aim of being the leading piece of legislation for all conduct matters relating to the entire financial services industry, it is

⁸ s 57 (n 3) "The objective of the Financial Sector Conduct Authority is to - (a) enhance and support the efficiency and integrity of financial markets; and (b) protect financial customers by—

(i) promoting fair treatment of financial customers by financial institutions; and (ii) providing financial customers and potential financial customers with financial education programs, and otherwise promoting financial literacy and the ability of financial customers and potential financial customers to make sound financial decisions; and (c) assist in maintaining financial stability."

⁹ 52 of 1998.

¹⁰ 53 of 1998.

¹¹ n 3 above.

¹² 18 of 2017.

¹³ Conduct of Financial Institutions Act (COFI) has not yet been promulgated. Its currently in the form of a Bill.

¹⁴ Du Toit and Hugo *Annual Banking Law Update 2019* (unpublished) Millard *Fair play? The Conduct of Financial Institutions Bill and the new face of the financial services industry* 129 - National Treasury released the draft conduct Financial Institutions Bill on 11 December 2018.

¹⁵ n 12 above.

¹⁶ n 13 above.

¹⁷ Du Toit (n 14) 135.

¹⁸ Marele "FSCA Bulletin Quarter 3" 2018/2019 4.

¹⁹ n 13 above.

imperative to determine if this shift will sufficiently meet the stated needs and provide the required protection to consumers.

If the legislature has not effectively dealt with all conduct matters in this regard, the ultimate loser will be the consumer, to which this legislation is primarily aimed at protecting, therefore making the legislation futile.

1.2. Research Question

The legislator has deemed it necessary for the COFI Bill,²⁰ to be introduced based on the need for more encompassing market conduct legislation. This study investigates whether this is indeed the correct sentiments or whether the FAIS Act²¹ in itself was adequate to deal with all forms of market conduct abuse. Another important question is whether the “generality” of FAIS makes it difficult to apply to specific products and if COFI is designed to avoid these hurdles.

By comparing the COFI Bill,²² with the FAIS Act,²³ this study will investigate under which statute consumers are better protected and whether the COFI is an improvement on the FAIS Act,²⁴ specifically for the short-term insurance industry. This literature review will uncover whether there is a need for this new piece of legislation and whether the draft format requires more fine-tuning. This is then the crisp research question: Is the COFI Bill an improvement on the FAIS Act?

1.3. Research Objective

The importance of this dissertation is due to the fact that the COFI Bill,²⁵ is soon to be the main statute on conduct legislation for all financial services providers across various financial services industries.²⁶ This study will show whether the consolidation of market conduct legislation has been adequately compiled so as to meet its stated goal of consumer protection.

Accordingly, the purpose of this study is to determine whether the COFI adequately deals with conduct matters across these financial services sectors, as indicated above, since vulnerable consumers will look to this single piece of legislation for relief and/or guidance. This study

²⁰ n 13 above.

²¹ 37 of 2002.

²² n 13 above.

²³ n 21 above.

²⁴ n 21 above.

²⁵ n 13 above.

²⁶ Du Toit (n 14) 129.

will provide a critical analysis between the two pieces of legislation and provide an opinion on its effects, practicability and whether it meets its purpose. This study will highlight the areas where the COFI Bill's legislative reach is far more extensive than the FAIS Act²⁷ allowed for.

1.4. Research Methodology

The method of research this study will use is a literature review (doctrinal research). This methodology will be used to provide insight on the COFI Bill²⁸ compared to the FAIS Act²⁹ in light of TCF requirements.

1.5. Proposed Chapter Outline

This study commences with an introduction of the legislative and regulatory environment of the financial services industry in South Africa and details the research question, purpose of this study and the limitations thereof. Chapter 2 will, in more detail, discuss the history of the regulatory and financial services legislation to date. It will detail the old regulatory position and indicate the shift to a twin peak governance regime. In Chapter 3, this study will provide an investigation into the market conduct provisions applicable to the short-term insurers. It will examine how the regulator has enacted market conduct protection for consumers by looking at the FAIS Act,³⁰ including the PPRs,³¹ and the General Code of Conduct ("GCC").³² In Chapter 4, this study will then, similar to the previous Chapter, provide an analysis of the COFI Bill³³ and indicate how the draft legislation intends on providing the new conduct standards to consumers. Chapter 5 will detail recommendations as to which piece of legislation adequately protects insurance consumers and whether the new approach to an all-encompassing conduct authority is going to be more effective than the previous regime and ultimately whether insurance consumers are better treated under the COFI Bill,³⁴ in line with the TCF framework. Finally, Chapter 6 concludes the study and will reflect upon the research question and highlight under which piece of legislation insurance consumers are better protected.

²⁷ n 13 above.

²⁸ n 13 above.

²⁹ n 21 above.

³⁰ n 21 above.

³¹ Policyholder Protection Rules in terms of s 55 of the Short-Term Insurance Act 53 of 1998 (hereafter referred to as "the 2018 PPRs for Short-term Insurance").

³² General Code of Conduct for Authorised Financial Service Providers and Representatives (GCC), 2003.

³³ n 13 above.

³⁴ n 13 above.

1.6. Limitation of Study

This dissertation will be restricted to the impact upon short-term insurers and their policyholders as a result of the limitations involved in a minor dissertation. Therefore, this dissertation will not endeavour to detail the impact on the entire financial services industry, such as long-term insurers, their policyholders, banks and their clients, nor will it address prudential matters at any length. Moreover, this study will be premised on the first draft of the Conduct of Financial Institutions Bill,³⁵ as it stands at July 2019.



³⁵ n 13 above.

CHAPTER 2

BACKGROUND TO THE REGULATORY FRAMEWORK OF THE INSURANCE INDUSTRY IN SOUTH AFRICA

2.1. *Introduction*

The legislative regime surrounding the insurance industry was first introduced to South Africa in 1943 under the Insurance Act.³⁶

However, during 1998 the insurance industry underwent a period of transformation and the Short-term Insurance Act,³⁷ (STIA) and the Long-Term Act,³⁸ (LTIA) were introduced. These two statutes were enacted to govern the short-term insurance and long-term insurance industries, respectively.

Previously, the Financial Services Board (FSB) was the regulatory authority for the non-banking sector in South Africa,³⁹ from 1990 to 2018.⁴⁰ The FSB gained its authority under the Financial Services Board Act.⁴¹

Alongside the STIA and the LTIA, is another extremely important statute for the insurance industry, namely, the Financial Advisory and Intermediary Services Act,⁴² (FAIS Act). The FAIS Act is the foundation on which the FSB governed the insurance industry's conduct-related matters. This act has been the leading authority for all conduct related behaviour for the insurance industry and currently is still in force.

2.2. *Subordinate legislation*

As mentioned in chapter one, in addition to the primary legislation contained in STIA, LTIA, and FAIS Act, there are numerous regulations not contained in the primary legislation that are

³⁶ 27 of 1943.

³⁷ n 10 above.

³⁸ n 9 above.

³⁹ The FSB controlled the following acts, the Collective Investments Schemes Control Act, the Financial Services Board Act, Financial Institutions (Protection of Funds) Act, Financial Supervision of the Road Accident Fund Act, Friendly Societies Act, Inspection of Financial Institutions Act, Short-terms Insurance act, Long term Insurance Act, Pensions Funds Act, Supervision of the Financial Institutions Rationalisation Act, the Securities Services Act and the Financial Advisory and Intermediary Services Act.

⁴⁰ Unknown "Financial Services Board (South Africa)" 2019 Wikipedia ([https://en.wikipedia.org/wiki/Financial_Services_Board_\(South_Africa\)](https://en.wikipedia.org/wiki/Financial_Services_Board_(South_Africa)) (10-06-2019)). This source was utilised due to the FSB's website being removed.

⁴¹ n 1 above.

⁴² n 21 above.

to be read in conjunction with the respective acts, such as PPRs, demarcation regulations and General Code of Conduct (GCC), to name but a few.

2.3. *The need for reform*

A lot of attention has been placed on regulatory reform for the financial sector following the global financial crisis, as a result of poor practices and inadequate regulatory oversight of the financial sector.⁴³ However, due to a number of high profile cases⁴⁴ dealing with poor practices in the South African financial services industry, this sector has been under inspection long before the global crisis.⁴⁵

In a move to align, simplify and modernise the financial services industry the legislature has brought about an immense change in the South African regulatory landscape.

As mentioned in chapter 1, during 2017 the financial sector saw the implementation of the Financial Sector Regulation Act,⁴⁶ and along with this came the introduction of the twin peaks model into its regulatory arena.⁴⁷ The term “twin peaks” was given as a result of the two regulatory authorities, namely the Financial Sector Conduct Authority (FSCA),⁴⁸ and the Prudential Authority (PA),⁴⁹ each occupying a respective “peak”.

With the implantation of the Twin Peaks model the former Financial Services Board, which regulated both conduct and prudential matters, has now been replaced by and housed under the two separate authorities. The PA administers all prudential matters within the financial services sector, such as financial health and warranting that financial providers meet financial obligations to financial customers and the FSCA, deals with all conduct matters across all financial institutions.⁵⁰

⁴³ National Treasury *Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill* 2018 6.

⁴⁴ National Treasury *Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill* 2018 6 n “in 2005 for example after extensive engagement a statement of intent was signed between the Minister of finance and the long-term insurance industry, committing to reducing early termination penalty fees on savings policies. This was subsequently entrenched in legislation. In 2006, the Competition Commission began its investigation into the retail banking sector, with its findings being published in 2008, noting a number of poor customers’ outcomes in the sector. In the investment management sector, 2007 and 2010 saw the Fidentia and Sharemax scandals, respectively, which highlighted the need for better protection investors”.

⁴⁵ n 43 above 6.

⁴⁶ See the FSR Act in its entirety for an overview of the two peaks.

⁴⁷ Schmulow “Twin Peaks – the Big Bang of SA’s financial industry” 2018 fin24 (<https://www.fin24.com/Opinion/twin-peaks-the-big-bang-of-sas-financial-industry-20180408> (15-06-2019)) as stated the twin peaks model was first adopted by Australia two decades ago.

⁴⁸ Also referred to as the Regulator or authority, interchangeably.

⁴⁹ Also referred to as the Regulator or authority, interchangeably

⁵⁰ National Treasury “Media Statement – invitation for public comments on the draft Conduct of Financial Situation Bill” 2018 1.

2.4. *The FSCA*

As stated in the FSR Act, an objective of the FSCA is to protect financial customers⁵¹ by “promoting fair treatment of financial customers by financial institutions.”⁵²

Currently, the way in which the FSCA is able to achieve this objective within the insurance industry is through the cross-cutting conduct framework that promotes fair customer treatment, such as the Long-term Policyholder Protection Rules,⁵³ (LT PPR) and the Short-Term Policyholder Protection Rules⁵⁴ (ST PPR).

It will become evident from the below that with the implementation of both the LT PPR’s and the ST PPR’s, there has been a great shift in the conduct framework which is now strongly powered towards treating customers fairly and which has certainly paved the way for the COFI Bill and the financial services industry as a whole.

As a result of the implementation of the twin peaks model, all prudential matters addressed the STIA and the LTIA have been repealed by the Insurance Act.⁵⁵ With the implementation of the Insurance Act all prudential matters are governed herein, such as licencing and financial stability specific to insurers.

2.5. *Evaluation*

As seen with the impending repeal of the STIA and the LTIA, the FAIS Act, along with all its subordinate legislation will soon too be replaced by the Conduct of Financial Institutions Bill,⁵⁶ (COFI). It must be noted that the FAIS Act and the PPR’s are specific to the insurance industry. This left a gap in that only insurance consumers were entitled to the protection under the PPR’s. With the advent of the COFI Bill the legislature has set out a single piece of legislation that will incorporate this additional protection, previously only enjoyed by insurance consumers to now be to the benefit of all financial services customers. The COFI Bill will be applicable to, inter alia, the following sectors: banking; investments and insurance. The COFI Bill is set to

⁵¹ s 1 of the COFI Bill “financial customer” means a person to, or for, whom a financial product, a financial instrument, a financial service or a service provided by a market infrastructure is offered or provided, in whatever capacity, and includes— (a) a successor in title of the person; and (b) the beneficiary of the product, instrument or service.

⁵² s 7(1)(c) of the FSR Act.

⁵³ s 62 Long-Term Insurance Act 52 of 1998.

⁵⁴ s 55 of the Short-Term Insurance Act 53 of 1998.

⁵⁵ See Schedule 1 (Laws Amended) of the Insurance Act 18 of 2017.

⁵⁶ Schedule 1 of the COFI Bill.

govern all conduct related matters within the financial sector. As such, the reach of the COFI Bill has been cast much wider than its predecessor, the FAIS Act.⁵⁷

The chapters to follow will look into the FAIS Act (and its respective subordinate legislation) as well as the COFI Bill to provide a better understanding of the respective pieces of legislation and how the market conduct provisions are dealt with.



⁵⁷ n 21 above.

CHAPTER 3

ANALYSIS OF THE FAIS ACT

3.1. Introduction

During 2004 the FAIS Act,⁵⁸ was introduced into the financial advisory and intermediary space. The FAIS Act includes various rules to be followed by financial advisers and intermediaries. These rules include not only the qualifications and characteristics of honesty and integrity that a financial adviser must adhere to but it also details the requirements financial advisers must follow when providing advice.⁵⁹ The act sets out licensing requirements, competency requirements such as professional exam and enforcement matters, to list but a few. All these aspects have been enacted to help create a safer financial service industry, where the interest of consumers is paramount.⁶⁰

The FAIS Act follows a strict rules-based approach, as opposed to a principle based one.⁶¹ What this means in practice is instead of giving effect to the principle that underlies the rules and consideration to the intention of the legislature the rules become used in a tick-box fashion and the purpose of the rule is lost.⁶²

Furthermore, it's worth noting that the FAIS Act is applicable to FSP's and their representatives who render advice and/or intermediary services in respect of financial products. In reality this is specifically dealt with by intermediaries who sell insurance. As such, the jurisdiction in which the FAIS Act operates is limited to specific role players in the financial sector and excludes the banking industry and investment sector, per se.

Chapter 3 below contains a more in-depth analysis of the FAIS Act, General Code of Conduct and the Policyholder Protection Rules and highlight how these rules relate to the overall effectiveness of establishing market conduct regulation.

Although "market conduct" as a concept has been introduced by the FSR Act, in retrospect one can safely state that the FAIS Act, together with the very first sets of PPR, constituted the first rules on market-conduct regulation, which is why an analysis of the FAIS Act is useful to this discussion.

⁵⁸ n 21 above.

⁵⁹ Millard and Hattingh *The FAIS Act Explained* (2d ed) 1.

⁶⁰ Millard (n 59) 1.

⁶¹ Millard (n 59) 26.

⁶² Millard (n 59) 7.

3.2. *Layout of the FAIS Act*

The FAIS Act has been described as being, “merely a skeleton with the actual “flesh” contained in its subordinate legislation”.⁶³ As such, it’s prudent to look into some of the subordinate legislation, such as the General Code of Conduct (GCC) and the ST PPR’s.

First, we will look at the layout of the FAIS Act and provide a brief description of what each chapter deals with. The Act is dissected into seven chapters, with chapter 6 being broken up into two parts. The chapters can be summarised as follows:

3.2.1. *Introductory Provisions*

This chapter comprises of the definitions and application applicable to this Act. As previously indicated this Act applies specifically to Financial Service Providers (FSPs),⁶⁴ and thus the definitions are extremely important when trying to interpret the scope and application of the Act. It is evident from the definition of an FSP that if their ordinary course of business is rendering advice⁶⁵ and/or an intermediary service⁶⁶ this Act is applicable to their day to day operations and must be adhered to when performing their functions. As a result of the promulgation of the FSR Act, two new subsections have been included hereto, namely “the Relationship between the Act, the Financial Sector Regulation Act and Regulatory Instruments”. In short, the inclusion of the first subsection deals with the fact that any reference made under the FAIS Act to certain provisions must be read as a reference to the FSR Act. The second inclusion deals with the definition of Regulatory Instrument and aligns it with the definition in the FSR Act.

⁶³ Millard (n 59) 57.

⁶⁴ In terms of s 1 of the FAIS Act, “Financial service provider” means any person, other than a representative who as a regular feature of the business of such person – (a) furnishes advice; or (b) furnishes advice and renders any intermediary service; or (c) renders an intermediary service.

⁶⁵ In terms of s 1 of the FAIS Act, “Advice” means, subject to subsection (3)(a), any recommendation, guidance or proposal of a financial nature furnished, by means or medium, to any client or group of clients – (a) in respect of the purchase of any financial product; or (b) in respect of the investment in any financial product; or (c) on the conclusion of any other transaction, including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product; or (d) on the variation of any term or condition applying to a financial product, on the replacement of any such product, or on the termination of any purchase of or investment in any such product, and irrespective of whether or not such advice – (i) is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or (ii) results in any such purchase, investment, transaction, variation, replacement or termination as the case may be, being effected.

⁶⁶ In terms of s 1 of the FAIS Act, “Intermediary Service” means, subject to subsection (3)(b), any act other than the furnishing of advice, performed by a person for on behalf of a client or product supplier – (a) the result of which is that the client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or (b) with a view to – (i) buying, selling or otherwise dealing in (whether on a discretionary or non-discretionary basis), managing, administering, keeping in safe custody, maintaining or servicing a financial product purchased by a client from a product supplier or in which the client was invested; (ii) collecting or accounting for premiums or other moneys payable by the client to a product supplier in respect of a financial product; or (iii) receiving, submitting or processing the claims of a client against a product supplier.

3.2.2. Chapter 1: Administration of Act

This chapter deals with the role and powers of the FSB in administering the act. The sections in this chapter detail the registrar's powers to delegate and recognise representative bodies, along with the registrar's powers to set out the foundation for the fit and proper requirements applicable to the FSP's, key individuals and representatives.⁶⁷

3.2.3. Chapter 2: Authorisation of Financial Service Providers

Chapter 2 of the act consists of the licensing requirements applicable to FSP's, together with the application requirements that need to be adhered to by an applicant when applying for an FSP licence. Unlike the section above in chapter 1, of the act which provides the FSB with the powers to prescribe the fit and proper requirements, this chapter places a duty on the FSPs, Key individuals and Representatives to at all times comply with the requirements and remain fit and proper. Lastly, this chapter covers the steps to be followed by the registrar when suspending or withdrawing a FSP licence as well as the lapsing of a FSP licence.⁶⁸ The importance of "authorisation" is that it denotes the birth and continued, legitimate existence of an FSP.

3.2.4. Chapter 3: Representatives of Authorised Financial Service Providers

This chapter is applicable to representatives of an FSP and highlights the applicable qualifications and competency requirements that need to be met when acting as a representative. It also deals with the duties imposed on an FSP to ensure that its representatives meet the stipulated requirements. Furthermore, it addresses the situations in which a representative must be debarred.⁶⁹ This aspect is of importance because the need for proper qualifications have professionalised the financial services industry. The idea is that if a representative is adequately qualified, such representative is skilled to render services on an acceptable standard, thereby providing adequate protection to consumers.

⁶⁷ Ch 1 (n 21).

⁶⁸ Ch 2 (n 21).

⁶⁹ Ch 3 (n 21).

3.2.5. Chapter 4: Codes of Conduct

Chapter 4 comprises of the registrars' duties that need to be followed when drafting a code of conduct. This section provides the registrar with the authority to compile the various codes of conduct applicable to the different categories of FSP's. The principles of the code of conduct are addressed in this section and it's important to note that when the registrar drafts a code of conduct they need to draft same in a manner which guarantees that clients that are being rendered financial services are able to make informed decision and that their reasonable financial needs are being met.⁷⁰ Part and parcel of ensuring that financial consumers' needs are met and that they are able to make an informed decision about a financial product entails,⁷¹ *inter alia*, that representatives and FSP's act honestly and fairly, with the necessary due skill, care and diligence in the interests of the policyholders and the integrity of the financial services industry. The rules associated with these requirements are covered in this chapter.⁷² This is in essence market conduct, namely that a number of detailed rules should be followed when rendering services to clients.

3.2.6. Chapter 5: Duties of Authorised Financial Service Providers

This chapter addresses the duties that a FSP must comply with when appointing a compliance officer; maintaining records (which must be kept for a minimum period of five years) and the accounting and auditing requirements imposed on FSPs'.⁷³ These rules provide indirect consumer protection as it provides the superstructure (or infrastructure) within which FSPs should operate.

3.2.7. Chapter 6: Enforcement

Chapter 6 is made up of two sub sections, namely, part 1: Ombud or financial services providers and part 2: other enforcement measures.⁷⁴ Part 1 introduces the FAIS Ombud into the enforcement arena. The objective of the FAIS ombud is to consider and dispose of complaints raised by consumers under this act. The remainder of part 1 covers items such as funding of the ombud's office, appointment of ombud and deputy ombud and general administrative powers of the ombud, to list but a few. Part 2 identifies other enforcement action that can be

⁷⁰ Millard (n 59) 119.

⁷¹ Millard (n 59) 1.

⁷² Ch 4 (n 21).

⁷³ Ch 5 (n 21).

⁷⁴ Ch 6 (n 21).

implemented in order to remedy a transgression. Under part 2 of this chapter the registrar has the power to declare particular business practices undesirable, make regulations it deems necessary and impose penalties on persons who contravene sections of the Act. Lastly this part 2 prescribes requirements that need to be adhered to in instances when FSP's undergo voluntary sequestration, winding up, closure and business rescue proceedings. The importance of this portion of the FAIS Act is that it provides redress to consumers of financial services where intermediaries and advisors failed in their duties.

3.2.8. Chapter 7: Miscellaneous

The last chapter of the act deals with miscellaneous items that are not covered elsewhere.⁷⁵ This chapter provides for the registrar to determine fees and penalties, as well as grants the registrar the authority to exempt persons from certain provisions, provided they have complied with the requirements thereof. These aspects pertain to infrastructure and again provides informal protection to consumers by "policing" compliance measures.

3.3. *Layout of the General Code of Conduct*

As indicated above, there are a number of codes that have been enacted that are applicable to certain types of product providers and create specific duties for product suppliers to adhere to. The codes of conduct prescribe the minimum standards that need to be obeyed by FSP's when interacting with clients.⁷⁶ Currently there are numerous different codes of conduct.⁷⁷ However, for the purpose of this study and in light of the limitation of the study we will only discuss the GCC for authorised financial services providers and representatives.⁷⁸

The GCC consists of various rules which are applicable to all FSP's and their representatives.⁷⁹ The purpose of these rules are to ensure that policyholders are treated fairly and that they are able to make an informed decision in respect of financial services being rendered to them by FSP's and their representatives. Below we will look into the various sections of the GCC and what they entail. The GCC consists of 14 parts.

⁷⁵ Ch 7 (n 21).

⁷⁶ Millard (n 59) 119.

⁷⁷ BN 79 of 2003 The code of conduct for administrative and discretionary FSPs, BN 80 of 2003 The general code of conduct for authorised financial services providers and representatives, BN 39 of 2004 The code of conduct for authorised financial services providers, and their representatives involved in forex investment business, BN 102 of 2004 The Specific code of conduct for authorised financial services providers and representatives conducting short-term deposit business.

⁷⁸ The GCC is one of four codes in terms of the FAIS Act. See n 71.

⁷⁹ Millard (n 59) 38.

3.3.1. Part 1: Introductory Provisions

This section of the GCC contains the definitions, construction and the application of the notice. The definition section is always vital in any piece of legislation as it provides the reader with an understanding of the respective words in the context.⁸⁰

3.3.2. Part 2: General Provisions

Part 2 of the notice includes the general and specific duties that providers need to adhere to. The general duty, states that *a provider must at all times render financial services honestly, fairly, with due skill care and diligence, and in the interests of clients and the integrity of the financial services industry.*⁸¹ Although this provision stems from our common law duty to act fairly and honestly when dealing with others, it has now been legislated which attracts enforcement action in the event that an FSP does not act in this manner. As the GCC is part of the market conduct legislation, this duty is of utmost importance and sets the tone, as its intention is to ensure that clients are protected when being rendered financial services.

This part of the Code further stipulates that there are specific duties of a provider that need to be complied with such as: when providing information to a client same must be factually correct, when information is provided in writing same must be clear and in readable print, and the information must be adequate and appropriate in the circumstance of the particular financial service and taking into account the clients aptitude for the financial product.⁸² All these provisions are included to ensure that the client is protect and is treated fairly when dealing with providers.

Lastly, this part caters for the requirement of providers to maintain a financial interest and conflict of interest policy.⁸³ This once again, is to safeguard clients and prevent clients from not receiving suitable financial advice based on their needs and instead receiving advice on what's most profitable for the provider.

⁸⁰ s 1 of the GCC. Note that although it is in fact correct to refer to “clauses” of codes, it has become customary to refer to “sections”.

⁸¹ s 2 of the GCC. See the enforcement action in *The Registrar of Financial Services Providers v Catscadellis and Botha (now Greyvenstein)* (Enforcement Committee Case No 6 of 6 November 2012) where the cold calling practices of the respondents were said to bring the financial services industry into disrepute. For a discussion of the case, see *Millard*, 76 THRHR 2013, 604-622. See also *The Registrar of Financial Services Providers v Talksure Trading (Pty) Ltd* (Enforcement Committee Case No 20/2014).

⁸² s 3 of the GCC. For an example of a FAIS Ombud decision, see *David Marthinus Adlen v Herman Coertzen Brokers CC and Herman Bernardus Coertzen* Case no FAIS 0091-13/14 FS 3.

⁸³ s 3A of the GCC.

3.3.3. Part 3: Information on Product Suppliers

This section prescribes certain information that must be disclosed to clients pertaining to the product supplier.⁸⁴ Details such as the physical address, contact details and the contractual relationships the product suppliers have with other products suppliers, all forms part and parcel of the prescribed details that must be disclosed. This responsibility ties back to the objective of the code in that clients must be able to make an informed decision when concluding a financial service and this type of information will assist the client in doing so.

3.3.4. Part 4: Information on Providers

This part 4 is similar to Part 3 above, only this time it speaks to the provider. The provider is obligated to provide clients with information relating to the provider such as contact details, concise information relating to the contractual relationship with the product supplier and details surrounding the representatives who act on behalf of the provider, such as whether they meet the fit and proper requirements.⁸⁵ Once again, this information is important and needs to be divulged to a client so that they can make an informed decision relating to the financial service being rendered.

3.3.5. Part 5: Contacting of Client

This section speaks to the manner in which providers must behave when communicating with clients.⁸⁶ Again, a provider must act honourably, professionally and with due regard to the convenience of the client when communicating. Once more, this illustrates that financial customers must be treated with respect when receiving financial services.

3.3.6. Part 6: Information about Financial Service

In addition to Part 3 and 4 above and in light of the client receiving all necessary information in order to make an informed decision, providers are obligated to disclose information surrounding the financial service to the client. The type of information about the financial service includes, all material contractual information surrounding the service, details pertaining

⁸⁴ s 4 of the GCC.

⁸⁵ s 5 of the GCC.

⁸⁶ s 6 of the GCC.

to the nature and extent of the benefits offered by the financial service and in the case of an insurance product, the amount and frequency of premiums.⁸⁷ Once again this highlights the importance placed on treating clients fairly.

3.3.7. Part 7: Furnishing of Advice

Part 7 covers the furnishing of advice to clients by providing guidelines of what is necessary in order to provide clients with suitable advice.⁸⁸ These guidelines include obtaining information from a client relating to their financial situation, their financial product experience and objectives. Once this information is obtained a provider should conduct an analysis and identify suitable financial products to the client's needs. Furthermore, providers are expected to maintain a record of advice, which contains a brief summary of the advice provided to a client.⁸⁹ This part of the notice is extremely important for providers to comply with to ensure they provide the necessary guidance to guarantee clients receive appropriate advice. The focus on advice is a pre-occupation of the FAIS Act.

3.3.8. Part 8: Custody of Financial Products and Funds

Part 8 deals with the manner in which a provider must hold and account for financial products and funds.⁹⁰ The list of requirements that must be adhered to by providers when receiving funds on behalf of a client includes, holding same in a separate bank account and ensuring that the funds are safeguarded. It's clear that these rules have been set out to protect the client from illicit activity taking place.

3.3.9. Part 9: Risk Management

Part 9 of the notice comprises of control measures, specific control objectives and insurance in order to mitigate the risk, as far as reasonably possible.⁹¹ Once again it is evident that this has been tabled so that the client is protected.

⁸⁷ s 7 of the GCC.

⁸⁸ s 8 of the GCC. See Millard and Hatting (n 56) 12-15, 128. See also the FAIS Ombud determinations in *Zakhele G Buthelezi v Actebis 406 CC t/a Pro-Brokers and Louis Kempen* Case no FAIS 07716/13-14/WC3 and *Jacques du Toit v Barrington Insurance Brokers (Pty) Ltd and John Frayne* (case no FAIS 01129/13-14/GP 3).

⁸⁹ s 9 of the GCC.

⁹⁰ s 10 of the GCC.

⁹¹ s 11 - 13 of the GCC. See the FSB's "Guidance on the interpretation and application of s 13(1)(c) of the FAIS Act 24 June 2015.

3.3.10. Part 10: Advertising and Direct Marketing

In the event that a provider advertises and/or is registered as a director marketer, this section will be applicable to the way in which it fulfils these functions. The requirements for advertising are quite onerous, but, understandably so. Providers must be sure not to mislead clients into purchasing a financial service with false or inaccurate information.⁹² As such there are strict requirements that must be complied with when advertising, such as not using fraudulent, untrue or misleading statements; warranting that warning statements about the risks involved in buying and selling a financial product are included and prominently displayed, etc. Direct marketers are obliged to disclose details about its business to the client, such as contact details, that it's a registered financial service provider, and when concluding business with a client, provide the client with written details of the product and benefits or consequences of non-compliance with certain provisions of the policy.⁹³ It's apparent that all these safeguards have been put in place in aid of protecting the client.

3.3.11. Part 11: Complaints

Part 11 of the GCC details the manner in which complaints must be handled by a provider. This includes ensuring systems and procedures are in place to attend to a complaint, such as having the required operational ability. Furthermore, a provider must have a documented internal complaints procedure that provides clients with process for the resolution of their complaints. The internal complaints procedure must include the process to be followed in the event of escalating a complaint should it not be satisfactorily resolved.⁹⁴ By incorporating the requirement for providers to have complaints systems and procedures in place will assist aggrieved clients resolve their grievances and provide them with some form of comfort that they will be heard.

3.3.12. Part 12: Termination of Agreement or Business

This section contains the steps that must be followed by a provider when a client requests the termination of an agreement between the parties. The provider is obliged to give effect to the clients request to terminate the agreement and in the event that the client makes the request on

⁹² s 14 of the GCC.

⁹³ s 15 of the GCC.

⁹⁴ s 16 - 19 of the GCC.

the advice of the provider the provider is obligated to make sure the client is aware of the consequences associated with the termination of the agreement.⁹⁵ Furthermore, this section also covers instances where a provider and/or a representative cease to operate, so that a client is informed immediately in order to make a decision.

3.3.13. Part 13: Wavier of Rights

This part of the GCC is extremely important as it relates to the client's protection afforded them in terms of the GCC. This section prohibits a provider from requesting or inducing a client to waive any right or benefit conferred on them in terms of this code. Any waiver of right or benefit will be null and void.⁹⁶ The inclusion of this rule safeguards the client from being taken advantage of, in so far as it relates to the rendering of financial services.

3.3.14. Part 14: Short Title and Commencement

Lastly, part 14 deals with commencement date of this general code of conduct.⁹⁷

3.4. *The Policyholder Protection Rules*

3.4.1. General

As indicated above, in light of the promulgation of the FRS Act the financial services industry underwent major regulatory reform. Part and parcel of this change included the repeal of all prudential matters under the STIA. However, until such time as the COFI Bill is introduced all conduct matters in relation to the short-term insurance industry will remain under the STIA and more specifically the Policyholder Protection Rules (PPR).⁹⁸ In light of the regulatory modifications there has been a great shift in the market conduct regulation, which is now strongly powered towards treating customers fairly, and this is indicative in the PPR's.

As a result of the scope of this study being limited to the short-term insurance industry the discussion below will be restricted to the Short-Term Insurance Policyholder Protection Rules and not those for the long-term insurance industry.⁹⁹

⁹⁵ s 20 of the GCC.

⁹⁶ s 21 of the GCC.

⁹⁷ s 22 of the GCC.

⁹⁸ n 31 above.

⁹⁹ n 53 above.

The commonly known “Treating the Customer Fairly” (TCF) principles have now been embedded into our existing regulatory framework through the implementation of the PPR’s.

The six TCF principles can be summarised as follows, namely:

- Outcome 1: TCF Culture;
- Outcome 2: Products must meet customer’s needs;
- Outcome 3: Customers must be given clear information;
- Outcome 4: Customers must be given suitable advice;
- Outcome 5: Customers must be provided with suitable products; and
- Outcome 6: No post-sale barriers

The PPRs have in principle been established to ensure the fair treatment of customers and thus you will note that the PPRs in essence deal with the six outcomes of the TCF principles.¹⁰⁰ Therefore, promulgation of the PPRs by section 55 of the STIA¹⁰¹ has entrenched the TCF principles into our legislation.

The PPR’s have been divided into chapters and deal with the six TCF principles under the various chapters which in turn consist of specific rules grouped together which address a particular TCF principle.

3.4.2. Chapter 1: Interpretation

Chapter 1 of the PPR’s deals with the application of the PPR’s as well as definitions that appear throughout the notice. Important to note under the application section is that the rules apply to all new and existing policies from the date which the rule takes effect, as indicated under chapter 8 of the PPR’s.

3.4.3. Chapter 2: Fair Treatment of Policyholders

Chapter 2 of the PPR contains Rule 1: Requirements for the fair treatments of policyholders.¹⁰² This rule prescribes the minimum standard that an insurer must follow when interacting with a policyholder. This standard codifies the common law position of acting with good faith by ensuring that the insurer acts with due skill, care and diligence and is similar to 3.3.2 above. This rule goes further by requiring an insurer to have policies and procedures in place that

¹⁰⁰ The amended Short-Term PPR’s effective 1 January 2018 replaced the 2004 PPR’s.

¹⁰¹ n 10 above.

¹⁰² Rule 1 of the 2018 PPRs for Short-term Insurance.

ensures the fair treatment to customers is at the forefront of the company's culture. In short, an insurance company must imbed in its DNA the principle of treating customers fairly.

3.4.4. Chapter 3: Products

Chapter 3 consists of Rule 2 – 9 and addresses items such as product design, micro insurance product standards, credit life and consumer credit insurance, cooling-off rights, negative option selection of policy terms and conditions, determining premiums and excess, void provisions and waiver of rights and signing of blank of uncompleted forms.

The rule addressing product design identifies various factors that need to be taken into account when designing a new product. All these factors are geared towards ensuring that the product is suitable to the policyholder.¹⁰³

The rule relating to micro-insurance product standards was intruded into the PPR's by way of a recent amendment to the notice. The purpose of this rule is to ensure financial inclusion as these rules target policyholders that wouldn't normally be able to afford standard insurance cover, or the intricacies associated with insurance products. This rule has strict guidelines that must be adhered to when selling micro-insurance to policyholders. These guidelines relate to the structures of the policy benefits, inception of the policy as well as throughout the policies lifecycle, including claims and complaints stages. The purpose thereof is to protect the vulnerability of this type of class of policyholder and to make sure that they are not taken advantage of when purchasing insurance products, but in the same breath, also allowing them or their assets to be protected against unforeseen circumstance.¹⁰⁴

Cooling-off rights are familiar to consumers who are afforded protection under the Consumer Protection Act (CPA).¹⁰⁵ However due to the fact that the CPA does not govern insurance contracts the legislature deemed it trite to afford policyholders some protection in terms of these policies. This rule allows a policyholder to cancel the insurance contract under certain conditions. This rule safeguards the policyholder from being tied into compulsory fixed term periods and from forfeiting any monies paid in terms of premium.¹⁰⁶

Negative option selection of policy terms and conditions caters for the objectives of market conduct in affording the policyholders the choice and not being forced to accept certain

¹⁰³ Rule 2 of the 2018 PPRs for Short-term Insurance.

¹⁰⁴ Rule 2A of the 2018 PPRs for Short-term Insurance.

¹⁰⁵ 68 of 2008.

¹⁰⁶ Rule 4 of the 2018 PPRs for Short-term Insurance.

conditions. This rule states that an insurer may not stipulate that a specific term and condition will apply except if such person explicitly elects a different term or condition.¹⁰⁷

Chapter 3 of the PPR's includes the minimum standards that must be followed when determining premiums and excess for insurance policies. The rule states that premiums and excess must be fair and commensurate, balancing the insurer's obligations and the benefits to be received by the policyholder. Furthermore, an insurer may not charge a policyholder any additional fee to the premium and the premium must be clearly and prominently disclosed to the policyholder before entering into the policy. This allows the policyholder to make an informed decision before concluding the insurance contract.¹⁰⁸

A rule addressing void provisions has been catered for under this chapter. This rule seeks to protect policyholders by prohibiting insurers from including provisions relating to polygraphs at claim stage, arbitration clauses when a dispute arises in respect of the policy and the refusal of an insurer to abide by the grace period in respect of late payment of premiums. This rule deems these types of provisions void.¹⁰⁹

As seen above, under section 3.3, the PPR's also makes provision for the waiver of rights. This rule stipulates that an insurer or intermediary cannot request or induce a policyholder, potential policyholder or claimant to waive any of their rights under these rules and any such waiver will be null and void.¹¹⁰ This protects the policyholder from insurers attempting to contract out of any of the rules provided in the PPR's as this rule will supersede any waiver of such right and declares any such waiver to any of these rules invalid and unenforceable.

Lastly, chapter 3 of the PPR's includes the signing of blank or uncompleted forms. This rule prohibits an FSP from permitting or allowing a policyholder, from signing any blank or partially completed forms in respect of any transaction relating to the policy, where another person will be required or allowed to complete the forms before the transaction can be concluded. This rule protects the policyholder by ensuring that they have completed the required forms to the best of their knowledge and by making a full disclosure where required.¹¹¹

¹⁰⁷ Rule 5 of the 2018 PPRs for Short-term Insurance.

¹⁰⁸ Rule 6 of the 2018 PPRs for Short-term Insurance.

¹⁰⁹ Rule 7 of the 2018 PPRs for Short-term Insurance.

¹¹⁰ Rule 8 of the 2018 PPRs for Short-term Insurance.

¹¹¹ Rule 9 of the 2018 PPRs for Short-term Insurance.

3.4.5. Chapter 4: Advertising and Disclosures

Chapter 4 of the PPR's deals with rule 10 and 11, that is, advertising and disclosure requirements respectively. Both these rules were also covered under section 3.3 above in the GCC.

The rule relating to advertising is quite lengthy and detailed. Understandably so, it deals largely with the requirements that an insurer needs to adhere to when advertising an insurance product to policyholders or potential policyholders. The objective of this rule is to protect the policyholder from being caught up in all the hype created by adverts and being misguided and lured into purchasing a financial product that is not actually suited to their needs.¹¹²

Rule 11 of the PPR's deals with disclosures. This rule covers the important information that needs to be disclosed to the policyholder so that they are at all times appropriately informed. The disclosure is continuous; it takes place before the inception of the policy, after the inception of the policy and on an ongoing basis throughout the lifespan of the policy. The type of information that must be disclosed to a policyholder varies, depending on where the product is at in its lifecycle. The information includes, but is not limited to, the name of the insurer, concise details relating to the premium and frequency thereof, nature and extent of policy benefits, right to request recordings and the right to complain and the details of the insurer or respective Ombudsman must be disclosed.¹¹³

3.4.6. Chapter 5: Intermediaries and Distribution

Chapter 5 of the PPR's comprises of rule 12, arrangements with Intermediaries and other persons.¹¹⁴ This rule formalises the insurer's responsibilities when entering into an arrangement with an intermediary. The rule stipulates conditions that need to be adhered to before an insurer can authorise an intermediary or representative to act on its behalf. An example of such condition is that an intermediary must be licensed as a financial service provider and a representative must be a duly authorised representative before it can be appointed to represent the insurer. The rule goes further by making the insurer liable for the facilitation of fees payable by a policyholder to an intermediary or any other person. The purpose of this is to ensure that an intermediary is not remunerated twice for services it's already receiving fees for.

¹¹² Rule 10 of the 2018 PPRs for Short-term Insurance.

¹¹³ Rule 11 of the 2018 PPRs for Short-term Insurance.

¹¹⁴ Rule 12 of the 2018 PPRs for Short-term Insurance.

This rule specifically governs the relationship between an insurer and an intermediary; however, the objective remains to protect the policyholder. All the duties and responsibilities placed on the insurer are in line with the market conduct standards envisaged by the legislative framework to ensure policyholders are not exploited by unlicensed and or unauthorised representatives or charged additional fees. The insurer has indirectly become another authority figure by being responsible for the facilitation of the intermediary's interaction with policyholders and thus strengthening the oversight of the interaction with policyholders.

3.4.7. Chapter 6: Product Performance and Acceptable Service

This chapter comprises of rules 13 – 16 and deals with data management, the ongoing review of product performance, period of grace and record keeping.

The rule which speaks to data management provides that an insurer must have an effective data management framework in place. What this entails is that an insurer must have accurate and up-to-date information in respect of its policyholders at hand. This rule includes the requirement that all policyholders' information must be kept confidential and sufficient security measures must be in place to protect same.¹¹⁵

The on-going review of product performance places an obligation on the insurer to regularly monitor its products, its related distribution channels and its disclosures after a product has been released into the market. By providing for this obligatory review the insurer is responsible for ensuring that the product(s) and its method of distribution remain consistent with the needs of the policyholder and that it delivers fair outcomes to policyholders. This rule assists vulnerable policyholder from purchasing a product that is not suitable and does not deliver fair outcomes to the policyholder.¹¹⁶

Rule 15 addresses the period of grace. This rule caters for an extended period, of 15 days, after the due date for premium, for the policyholder to effect payment of said premiums. This rule is of particular importance at claim stage and protects a policyholder by affording him or her a period of grace to pay the premiums without allowing the insurer to cancel the policy for non-payment of premiums and thus preventing an insurer from rejecting a claim on these grounds¹¹⁷

¹¹⁵ Rule 13 of the 2018 PPRs for Short-term Insurance.

¹¹⁶ Rule 14 of the 2018 PPRs for Short-term Insurance.

¹¹⁷ Rule 15 of the 2018 PPRs for Short-term Insurance.

As with clause 3.2.6 above, the FAIS Act and the PPR's both make provision for record keeping.¹¹⁸ This rule prescribes a standard that an insurer must have appropriate systems and procedures in place to ensure the safe keeping of all communication and documents relating to a policy. The systems must allow for the appropriate storing and retrieving of all information. Furthermore, an insurer is obligated to keep all communication and documentation for a minimum period of 5 years from the termination of the policy.

3.4.8. Chapter 7: No Unreasonable Post-Sale Barriers

Chapter 7 of the PPR's encompasses rules 17 to 19 and deals with claims management, complaints management and the termination of policies, respectively.

Claims management, provides that an insurer must have and maintain an adequate and effective claims management framework.¹¹⁹ The rule sets out the requirements that an insurer must obey in order to provide for a satisfactory claim's management framework and details how a claim must be handled in the best interest of the policyholder. These requirements include a claim escalation and review process in the event that a claim is not handled to the satisfaction of the claimant. This affords a policyholder another level of protection by a more senior person reviewing the claims process and making a decision thereon.

Rule 18, complaints management is very similar in structure to the rule above. Once again, the insurer must ensure that it has an adequate and effective complaints management framework in place by promoting access to justice and affording the complainant various cost-effective options when submitting a complaint.¹²⁰ The complainant is afforded an opportunity to escalate the complaint to a more senior staff member should he/she not receive a satisfactory outcome. In addition, the complainant may approach the ombudsman or alternately the courts for relief, should the internal complaints process not afford the client the relief he/she is looking for.

Rule 19 deals with the termination of policies.¹²¹ This rule provides for instances when an insurer cancels a policy the insurer must give the policyholder at least 31 days written notice of its intention to terminate. The rule goes further to provide that an insurer will be liable under a policy for the shorter of 31 days or once the insurer has proof that the policyholder has received notice of its intention to terminate the policy. This rule and the requirements

¹¹⁸ Rule 16 of the 2018 PPRs for Short-term Insurance.

¹¹⁹ Rule 17 of the 2018 PPRs for Short-term Insurance.

¹²⁰ Rule 18 of the 2018 PPRs for Short-term Insurance.

¹²¹ Rule 19 of the 2018 PPRs for Short-term Insurance.

stipulated herein which the insurer must adhere to protects the policyholder so that they are aware that their insurance cover has been terminated and so that they don't get caught off guard and find themselves at claim stage, uninsured, due to the lack of the notification.

3.4.9. Chapter 8: Administration

The PPR's were gazetted into law on 15 December 2017 (along with amendments thereto which were made in October 2018).¹²² The PPR's will have a phased implementation process and this transitional period will afford insurers the opportunity to ensure they (and their intermediaries) adhere to all the Rules. Some of the Rules have been given a 24 months transitional period before they become effective.

3.5. *General observations on the FAIS Act, GCC and PPRs*

As noted from the above, the FAIS Act contains very little "flesh" to its structure. Most of the provisions addressing conduct matters lies in subordinate legislation such as the GCC and PPR's. It's worth mentioning that the provisions in the GCC and FAIS Act aims to ensure that consumers are being treated fairly.¹²³ It's also noteworthy that although FAIS is applicable to all "financial advisory and intermediary services", in practice, most intermediaries sell insurance (a specific financial service). Thus, making it difficult for FAIS to apply to the various types of financial services/products available to consumers.

Furthermore, as indicated above, there are many similarities between the GCC and the PPR's. The PPR's have however provided a set of rules and guidelines that embody the TCF principles and is aimed at dealing with conduct abuse. In addition, the PPR's have made the insurer "watch dogs" by conferring some of the supervisory duties under the PPR's onto insurers when it comes to monitoring intermediaries and their interaction with policyholders and ensuring the customers are treated fairly. The PPR's aim to formally incorporate the six TCF outcomes into our law, which was previously considered to be soft law.

It is important to make mention that it's quite evident that the PPR's are strictly applicable to the insurance industry and its policyholders,¹²⁴ which leaves gaps in respect of conduct related legislation for the rest of the financial services industry.

¹²² Government Notice 997 in respect of the section 62 of the Long-Term Insurance Act and Government Notice 996 in respect of section 55 of the Short-Term Insurance Act.

¹²³ Millard (n 59) 183 ff.

¹²⁴ Due to the fact that it is promulgated under the Short-Term Insurance Act and Long-Term Insurance Act only.

While the six TCF objectives are crucial in providing a foundation to fair treatment to customers its only now that they have been formally incorporated into legislation that financial institutions are taking this objective hereof seriously – this has indeed paved the way for the promulgation of COFI as its premised on the same structure.



CHAPTER 4

EXPLANATION OF THE COFI BILL

4.1. Introduction

During 2014, a discussion paper was released, termed “*Treating Customers Fairly in the Financial Sector: A draft Market Conduct Policy Framework for South Africa*”.¹²⁵ This discussion paper identified the poor outcomes being produced in the financial services industry, which could be largely attributed to the weaknesses in the legislative framework. As a result, thereof, a draft policy approach for developing a new market conduct framework was introduced into the financial sector.¹²⁶

The COFI Bill is part of the legislative reform designed to strengthen the regulation dealing with how financial customers are treated.¹²⁷ The Bill will significantly streamline the current conduct regulation for the financial sector as these regulations are presently found in numerous financial sector laws.¹²⁸ However, by replacing the conduct provisions the legislature must be mindful not to create gaps in the regulatory framework.

Further to the COFI Bill repealing conduct provisions in some thirteen different financial sector laws;¹²⁹ it is set out to create a strong, consistent and effective market conduct framework for all financial institutions.¹³⁰ The Bill aims at achieving this objective by consolidating the market conduct legislative landscape, by introducing the policy approach and incorporating the Treating the Customer Fairly (TCF) principles into legislation.¹³¹ The TCF principles place the consumer at the forefront. These six principles are commonly known to the insurance industry, however, currently, the TCF principles do not have any legal force in the rest of the financial services industry.

Under the Twin Peak structure, the FSCA has authority over all financial institutions.¹³² Furthermore, as per the definition in the FSR Act, financial customer includes retail and non-

¹²⁵ n 43 above 8.

¹²⁶ n 43 above 8.

¹²⁷ n 43 above 14.

¹²⁸ n 43 above 14.

¹²⁹ n 43 above 40 - The COFI Bill does not replace provisions in the National Credit Act or the Medical Schemes Act.

¹³⁰ n 43 above 14.

¹³¹ National Treasury “Media Statement – invitation for public comments on the draft Conduct of Financial Situation Bill” 2018 1.

¹³² s 1 of the FSR Act defines financial institutions as: “financial institution” means any of the following, other than a representative: (a) A financial product provider; (b) a financial service provider; (c) a market infrastructure; (d) a holding company of a financial conglomerate; or (e) a person licensed or required to be licensed in terms of a financial sector law.

retail customers, thus the Bill has jurisdiction over all conduct matters for both the retail and non-retail markets.¹³³ As such the FSCA's scope has expanded and is far greater than the scope covered by the FSB. As indicated the FSCA has jurisdiction of all conduct matters relating to all financial institutions,¹³⁴ and in turn has the authority over a larger number of financial customers. Accordingly:

“The COFI Bill aims at providing a consolidated, compressive and consistent regulatory framework for the conduct of financial institutions that will-

- Protect financial customers,
- Promote the fair treatment and protection of financial customers by financial institutions;
- Support fair, transparent and efficient financial markets;
- Promote, innovation and the development of and investment in innovative technologies, processes and practices;
- Promote trust and confidence in the financial sector;
- Promote sustainable competition in the provision of financial products and financial services;
- Promote financial inclusion;
- Promote transformation of the financial sector; and
- Assist the South African Reserve Bank in maintaining financial stability.”¹³⁵

4.2. The Development to a New Market Conduct Law: The Policy Approach

The 2014 discussion paper did not go unnoticed, and in creating the COFI Bill the underlying principles in this discussion paper were considered and used as the skeleton for the Bill.¹³⁶

These principles are *inter alia* as follows:

4.2.1. Activity-based

At present, there are numerous financial sector laws governing the financial institutions. These financial institutions are governed by the respective laws depending on their institutional definition.¹³⁷ An example of this is an institution defined as an insurance company is regulated under the now, Insurance Act,¹³⁸ and an institution defined as a bank is regulated under the

¹³³ n 43 above 20.

¹³⁴ Du Toit (n 14) 136 “all financial institutions such as the credit sector, national payments system, the financial markets, pension funds, collective investments schemes and medical schemes”.

¹³⁵ n 13 above 29.

¹³⁶ n 43 above 10.

¹³⁷ n 43 above 10.

¹³⁸ n 12 above.

Banks Act.¹³⁹ Evident from this is that financial institutions have always been regulated in an isolated manner.

The COFI Bill will move away from this silo approach and move to an activity-based one.¹⁴⁰ The Bill will achieve this by defining the activities of the financial sector and similar activities will receive similar regulatory oversight, despite the financial institution performing the activity. Implementing this method will close any gaps currently seen in the financial sector, as noticed; in the past financial institutions which fell under a different institutional definition escaped the regulatory supervision imposed on other financial institutions because it didn't fall within a particular institutional definition.¹⁴¹

By incorporating the activity-based approach into the financial sector, financial consumers who were once excluded from this regulatory protection will now be covered under this net as it has been cast much wider, furthermore, by embarking on this approach it will create an even regulatory playing field between financial institutions.¹⁴²

4.2.2. Principles-based

Currently, financial institutions follow a strict approach to complying with the rules and reporting, which leads to the letter of the law being followed, however this has resulted in the spirit of the law falling at the wayside. The shift in a principle-based approach will see the intention of the legislature being adhered to and not just a tick-box approach to obeying the rules.¹⁴³ This however does not mean that there will be no rules. In order to obtain the perfect balance, there needs to be an appropriate marriage between principles and rules which allows the authorities to monitor the spirit of the rules as well as the letter thereof.

4.2.3. Outcome-focused

The COFI Bill aims at achieving a strong market conduct framework and this is supported by the move to an outcome-focused approach. As such, the current focus on assessing compliance with a rules-based approach must shift to focusing on whether financial institutions are conducting themselves in a manner that delivers desired outcomes for the financial consumers and the legislature.¹⁴⁴ This approach will also hold the regulator accountable for ensuring its

¹³⁹ 94 of 1990.

¹⁴⁰ Millard (n 59) 4.

¹⁴¹ n 43 above 10.

¹⁴² n 43 above 11.

¹⁴³ n 43 above 11.

¹⁴⁴ n 43 above 12.

supervisory approach is effective by ensuring the outcomes from the financial sector are being met.¹⁴⁵

4.2.4. Risk-based and Proportionate

The Bill has seen a huge move towards a proportional approach. In a shift to an outcomes-based approach it is important that proportionality is applied to different types of risks arising from different types of activities being supervised. The regulator's supervisory approach must be influenced by proportionality when it sets standards and applies enforcement action in respect of different institutions in the financial sector.¹⁴⁶

By implementing proportionality into the financial sector, this will create a level playing field between different size financial institutions that bring different risks to financial customers and the economy. Proportionality will thus be a positive way of minimising regulatory barriers and consequently support transformation and financial inclusion, as these are objectives of COFI, as highlighted above.¹⁴⁷

4.3. *Layout of the COFI Bill*

In addition to COFI becoming a consolidated piece of market conduct legislation for the financial sector; it intends to be an easily understandable piece of legislation that avoids unwanted complexities.¹⁴⁸ The Bill is constructed by setting out clauses highlighting the purpose of each chapter as this will provide clarity and therefore the intention of the legislature will become more transparent.

The Bill consists of thirteen chapters and five schedules, which can be summarised as follows:

4.3.1. Chapter 1: Interpretation, Object and Application

This chapter contains the interpretation of the Bill which includes the definitions used within this piece of legislation; the objective of COFI which sets out, *inter alia*, to achieve fair treatment to customers, financial inclusion and transformation; further herein, the application of the Bill which is applicable throughout the financial sector which ensures all financial

¹⁴⁵ n 43 above 12.

¹⁴⁶ n 43 above 12.

¹⁴⁷ n 43 above 12.

¹⁴⁸ n 43 above 14.

institutions that provide financial products and financial services are subject to this Bill.¹⁴⁹ This places financial institutions on an even footing, especially in relation to oversight regulation by the authorities.¹⁵⁰

Another key aspect of the Bill is proportionality. By making provision for this, it caters for the smaller financial institutions which pose a low conduct risk to enter the financial sector market as the regulator can allow for certain exemptions in respect of the Bill. This means the FSCA is required to set its own standards and tailor its supervisory approach depending on the financial institutions, size, nature, complexity and scale.¹⁵¹ This aligns with COFI's objective of financial inclusion and transformation as the smaller players are able to enter the market without the onerous compliance requirements for the entities that pose larger conduct risks.¹⁵²

4.3.2. Chapter 2: Licensing

In terms of the FSR Act¹⁵³ licencing requirements for existing financial institutions remain as prescribed under the current financial sector laws.¹⁵⁴ The COFI Bill provides for a new conduct framework that will replace the current regulations with a single market conduct licence under the FSCA.¹⁵⁵ In order to serve the objectives of the Bill relating to transformation, financial inclusion and to support market development, the FSCA will be required to set parameters on licencing requirements for new entrants.¹⁵⁶ Some of the limitations included in this section stipulate the qualifying requirements to obtain a licence under COFI¹⁵⁷ and addresses representatives and the requirements that must be obeyed when operating in this capacity, for example, that they must remain fit and proper.¹⁵⁸ Lastly this chapter covers the conduct standards regarding licencing and allows the authority to prescribe the requirements relating to governance, operational ability and fit and proper requirements, to name a few.¹⁵⁹

¹⁴⁹ s 4(1) (n 13).

¹⁵⁰ n 43 above 16.

¹⁵¹ n 43 above 16.

¹⁵² n 43 above 41.

¹⁵³ n 3 above.

¹⁵⁴ n 43 above 16.

¹⁵⁵ n 43 above 17.

¹⁵⁶ n 43 above 17.

¹⁵⁷ ch 2 Part 5 (n 13).

¹⁵⁸ ch 2 Part 6 (n 13).

¹⁵⁹ ch 2 Part 7 (n 13).

4.3.3. Chapter 3: Culture and Governance

This chapter provides for the governance and operational requirements, fit and proper standards and general principles that must be complied with by all financial institutions. The FSCA is required to set requirements that must be adhered to in order to focus financial institutions on a sound governance culture centred around the fair treatment of customers which is aimed at improving customers confidence when dealing with financial institutions.¹⁶⁰ It's important to note that this chapter is premised on TCF principle, outcome 1: TCF culture.¹⁶¹ This chapter sets out obligations that need to be followed in order to meet the objective of placing the fair treatment of customers at the centre of the financial institutions culture. Some of these obligations include conducting business honestly, fairly with due skill and care, avoiding conflicts of interest and maintaining operational ability. This chapter identifies prohibited practices in respect of financial customers, such as inducing a customer to waive their rights afforded to them in terms of COFI and the prohibition of including unfair contract terms in contracts.¹⁶²

4.3.4. Chapter 4: Financial Products

This chapter caters for the design of financial products marketed and sold to financial consumer. It necessitates that financial institutions put clear processes and procedures in place when designing a financial product to ensure that same is suitable and meets the needs of the target market.¹⁶³ Chapter 4 is based on TCF principle, outcome 2: products must meet customer's needs.¹⁶⁴ As such this chapter includes points that need to be complied with when designing a financial product.

4.3.5. Chapter 5: Financial Services

Similar to chapter 4 above, this chapter deals with the requirements and procedures that must be followed by financial institutions when providing a financial service to customers.¹⁶⁵ This chapter indicates provisions that need to be adhered to when providing financial services to customers. These provisions include ensuring proper disclosures are made and that the

¹⁶⁰ n 43 above 17.

¹⁶¹ TCF outcome 1.

¹⁶² ch 3 Part 1 (n 13).

¹⁶³ n 13 above.

¹⁶⁴ TCF outcome 2.

¹⁶⁵ n 13 above.

objectives and interests of a financial customer are considered when rendering a financial service.

4.3.6. Chapter 6: Promotion, Marketing and Disclosure

This chapter covers the provisions of clear information and adequate information provided by financial institutions to financial customers before, after and during the point of sale in respect of a financial product and/or services so that financial customers can make an informed decision when considering a product or service.¹⁶⁶ Chapter 6 is founded on TCF principle, outcome 3: customers must be given clear information.¹⁶⁷ The standard prescribed under this chapter dictates the manner in which promotional and marketing material must conform to. It's a lengthy chapter but deals with a vast number of conduct provisions that must be followed. These standards include ensuring that information is not misleading, deceptive, fraudulent or contrary to the public interest. Furthermore, this information must be in clear and in plain language which is suitable to its target market.

4.3.7. Chapter 7: Distribution, Advice and Discretionary Investment Management

Further to the above, financial institutions are required to ensure that their distribution models are suitable to ensure that the delivery of appropriate products and services reach the correct target market. This is premised on TCF principle outcome 5: Customers must be provided with suitable products.¹⁶⁸

In addition, financial institutions are responsible for ensuring that financial consumers have access to appropriate advice. This is founded on TCF principle outcome 4, customers must be given suitable advice.¹⁶⁹ As such, customers should be able to understand and be in a position to compare the products or services and the distribution models should cater for fair competition between the financial institutions.¹⁷⁰

¹⁶⁶ n 13 above.

¹⁶⁷ TCF outcome 3.

¹⁶⁸ TCF outcome 5.

¹⁶⁹ TCF outcome 4.

¹⁷⁰ n 13 above.

4.3.8. Chapter 8: Post-sale Barriers and Obligations

This chapter is not unfamiliar to the insurance industry and in fact it's founded on one of the six TCF principles, namely outcome 6: no post sale barriers.¹⁷¹ When wanting to change financial products and/or services, or submit claims or complaints to the financial institutions, financial customers should not be faced with unreasonable post sale barriers.¹⁷² In order to assist financial institutions to comply with these objectives, chapter 8 sets out requirements that must be followed. These requirements include, providing clients with efficient and effective complaints management that resolves complaints in fair and expeditious manner, provide customers with products that are flexible and handle claims in a fair and professional manner.

4.3.9. Chapter 9: Safeguarding Assets and Operational Requirements

Chapter 9 relates specifically to institutions that invest, keep in safe custody and control or administer funds of a financial institution. This section will only apply to institutions that are not already regulated under another piece of legislation.¹⁷³ As such, this chapter ensures that non-prudentially regulated entities comply with suitable requirements to make sure funds are safeguarded.¹⁷⁴ In order to achieve the objective herein financial institutions will need to observe the utmost good faith and exercise proper care and diligence when ensuring that assets of financial customers are safeguarded. This chapter also prescribes the manner in which financial institutions must account for monies received and when transactions are concluded on behalf of the customer.

4.3.10. Chapter 10: Reporting

Financial institutions are required to comply with certain annual or ad hoc reporting requirements. The details of the reporting requirements are found in this chapter and include, *inter alia*, the information that must be disclosed, the frequency of the disclosure and the manner in which it must be disclosed. This chapter also address the appointment of an auditor and the requirements that need to be adhered to in order for this appointment to be successful, such as remaining fit and proper.

¹⁷¹ TCF outcome 6.

¹⁷² n 43 above 17.

¹⁷³ Ch 9 (13).

¹⁷⁴ n 43 above 17.

4.3.11. Chapter 11: Remedial Actions for Financial Customers

The FSR Act¹⁷⁵ provides the FSCA with its powers, this chapter details the types of remedial action available to financial customers and which can be enforced by the FSCA.

4.3.12. Chapter 12: General Provisions

The application of the Bill in respect to other legislation, the process for setting out conduct standards and the process for making applications or notifications to the FSCA are detailed in this chapter.¹⁷⁶ Furthermore, this chapter also includes offences and reporting contraventions by financial institutions.

4.3.13. Chapter 13: Final Provisions

This chapter highlights the transitional periods from the previous sectorial laws to ensure that there is a smooth implementation of the COFI Bill when same is in force so that financial institutions are not left scrambling to try and comply with the new framework and that there are no gaps in the move from the previous regulations to the Bill.¹⁷⁷

4.3.14. Schedules

Following chapter 13, the Bill consists of 5 schedules. These schedules address, laws amended, categories and sub-categories of activities requiring licensing, institutional form,¹⁷⁸ transitional arrangements in respect of licencing and activities of representatives.¹⁷⁹

4.4. *General Observations of the COFI Bill*

As can be seen from the above, the structure followed in COFI are aligned with the TCF outcomes-based framework which has been designed to provide for certain outcomes at different stages in which a financial consumer would engage with a financial institution.¹⁸⁰

¹⁷⁵ n 3 above.

¹⁷⁶ n 43 above 18.

¹⁷⁷ n 13 above.

¹⁷⁸ (n 13 above) The content of this schedule is to be developed. This schedule will include a table of categories of financial institutions and financial activities that are undertaken and indicate the nature of the institutional form that a licensee to conduct a particular activity would be required to have.

¹⁷⁹ (n 13 above) The content of this schedule is to be developed.

¹⁸⁰ The outcomes in the COFI Bill are however broader than the TCF outcomes. The TCF outcomes are mainly aimed at retail customers, whereas COFI has been cast much wider and has jurisdiction across the financial sector and not limited to the retail sector.

The COFI Bill will consolidate the market conduct legislation in the financial sector which will introduce a measure of fairness and address the market conduct risks by improving overlaps and gaps between the current conduct legislation.¹⁸¹ It is apparent that COFI clearly aims to ensure that everything related to financial services, financial products and financial instruments is regulated.¹⁸² Further objectives of the Bill are to ensure transparency, promote financial inclusion, encourage suitability relating to financial services and product costs and in turn, build greater confidence and trust in the financial sector.¹⁸³ Vulnerable financial consumers will profit from the inclusion of the development of a financial product and service lifecycle as products and services will become relevant to the consumer's needs.

It is evident from the above that the theme throughout the COFI Bill is directed at the protection of financial customers and the Bill is geared at placing their interests and needs at the forefront of how the financial industry must treat their customer, which in turn empowers financial consumers. Furthermore, because COFI will be applicable to the entire financial sector it is best placed to deal with transformation requirements in the sector.¹⁸⁴ The COFI Bill certainly establishes effective market conduct regulation in protecting the fair treatment of customers.



¹⁸¹ Du Toit (n 14) 130.

¹⁸² Du Toit (n 14) 133.

¹⁸³ n 43 above 30.

¹⁸⁴ Du Toit (n 14) 136.

CHAPTER 5

RECOMMENDATIONS

History shows that financial customers are often not treated fairly and are manipulated into buying financial products or services that are complex or not fit for their needs or deliver very little value for money.¹⁸⁵ This creates a risk to the financial customers and in turn affects the stability of the financial sector. By identifying these risks, it was deemed necessary by the regulators to introduce the Twin Peaks module into our legislative framework which caters for the FSCA to deal specifically with ensuring that financial customers are treated fairly and to make sure financial institutions conduct themselves with integrity.

As seen from the chapters above, the various chapters in the FAIS Act (including some of the important subordinate legislation like, GCC and ST PPR's) as well as the COFI Bill have been summarised to give a brief understanding of what is covered in the respective pieces of legislation.

It's evident from the above, that the COFI Bill introduces a stronger, all-inclusive statute addressing market conduct¹⁸⁶ of financial institutions. As a result, hereof, improvements are made to the FAIS Act by providing for better market conduct outcomes, as well as aligning conduct related matters to the rest of the financial sector.

Silo improvements to the FAIS Act would not reach all types of financial institutions and as such, their customers are not afforded protection under this piece of legislation thus leaving a gap between financial institutions and their financial customers, (i.e, the banking sector and banking customers are not regulated under FAIS nor protected by its conduct requirements).

However, *prima facie*, it seems as though short-term insurance policyholders are sufficiently protected under FAIS and more specifically under the PPR's, however this leaves the rest of the financial industry vulnerable.

Nevertheless, the current conduct legislative regime prescribes a very tick-box approach to compliance with the legislation which in effect results in the letter of the law being followed even though poor outcomes are being produced¹⁸⁷. In essence this means the spirit of the law is falling by the wayside and in turn the unfair treatment of financial consumers is on the rise.

¹⁸⁵ Singh "Socio-economic impact assessment system" 2018 Department: planning, monitoring and evaluation Republic of South Africa 4.

¹⁸⁶ Millard (n 59) 6 states: "Market conduct refers to the way in which financial service providers conduct their business, design and price their products and treat their customers."

¹⁸⁷ Singh (169) 5 and Millard (n 56) 80.

Thus, shifting from following the letter of the law to a more outcomes-based and principle-based approach, as intended by COFI, will see financial consumers receiving more protection, including those already in the short-term insurance space, currently receiving protection under FAIS.¹⁸⁸

In addition, the provision of proportionality envisioned by COFI will see emerging enterprises entering the financial sector which will create competition in the market and provide a larger variety of financial services and products to consumers.

Therefore, by implementing a consolidated conduct market piece of legislation, which is focused on fair treatment to financial consumers and has greater jurisdiction, which means more consumers will be protected, definitely affords COFI some brownie points.

The advent of COFI will certainly have a greater impact on some of the financial institutions compared to that of others. However, the outcome of streamlining the regulatory framework is most welcomed in the financial services industry as it will minimise the number of burdensome pieces of legislation and the complexities that come with having to regulate and comply with the numerous acts. Furthermore, providing for a consolidated framework will also ensure that all financial institutions are on level playing field when it comes to the oversight regulation by the authorities as they will all be required to uphold the same standard of fairness towards financial customers, regardless of the type of financial institution. However, it will be interesting to see how the authorities regulate the financial institutions and their compliance with the act.

Moreover, it's worth noting that the Bill has been constructed in a way that is easy to read and provides readers with a brief description of the purpose of each chapter or part. This will assist financial consumers and financial intuitions in understanding what the legislature's intention is when trying to achieve an outcome set out in the Bill.

Essentially financial customers will benefit from the COFI Bill because it will reinforce the market conduct landscape by consolidating and strengthening existing laws which will now be applicable to the entire financial sector, resulting in greater consumer protection principles across the sector. Its core function is to ensure adequate protection to financial consumers and its evident that financial consumers will receive far greater protection under the COFI Bill as its premised on the TCF principles.

¹⁸⁸ Marele "FSCA Bulletin Quarter 4" 2018/2019 19.

CHAPTER 6

CONCLUSION

Firstly, this study provided a background to the insurance industry in South Africa and how the legislation has evolved over the years. To the point where South Africa has welcomed the twin-peaks model into our financial sector and is gearing itself towards a regulatory reform with the advent of new legislation and the repeal of many more. Secondly, this study considered the various pieces of legislation (which will soon be repealed) that currently governs the market conduct provisions in the Short-Term Insurance industry. In doing so, this study detailed an explanation of the FAIS Act, GCC and ST PPR's and provided a brief summary of each chapter and the purposes thereof. This chapter of the study highlighted how the authorities are currently enforcing market conduct provisions into the short-term insurance industry and in turn how financial consumers are being protected. This study, thirdly, looked into the COFI Bill, the proposed draft piece of legislation that is soon set to regulate all conduct matters in respect of the entire financial services sector. This chapter detailed the objectives of COFI and how it is aimed at consolidating and strengthening the regulation dealing with the fair treatment of financial customers and to restore integrity into the financial industry. This chapter included a brief explanation of each chapter in the Bill, which became apparent, is founded on the 6 TCF principles. Lastly, this study considered whether it was indeed necessary to embark on the twin peaks model and introduce new market conduct legislation into the financial services industry or if short-term insurance consumers had adequate protection under the FAIS Act, read along with its subordinate legislation.

There has been an increase in the emphasis of market conduct regulation in the financial services industry which has been brought about as a result of the creation of the Twin Peaks Module by the promulgation of the FSR Act. The ultimate vision of the FSCA is to see an efficient financial sector where customers are treated fairly and have faith and trust in the financial industry.

In essence, the inevitable promulgation of the COFI Bill will be a positive change to the financial services industry as a whole. The objectives set out in the Bill are most certainly aimed at providing the financial consumer with the utmost protection when dealing with the financial services industry. By consolidating the regulatory landscape for the financial sector, it will strengthen customer protection by implementing a single comprehensive market conduct law in the industry. This will result in the consistent application of consumer protection

principles across the financial sector which aims at protecting vulnerable financial customers who are not financially astute when it comes to financial products.

The initial research question was to investigate whether short-term insurance customers are afforded more protection under the COFI Bill compared to that of the FAIS Act. Despite the innovation of the legislature to introduce COFI into the legislative arena it seems that the short-term insurance industry was *prima facie* sufficiently protected under the FAIS Act.

This dissertation therefore concludes that introduction of the COFI Bill into the financial sector is definitely a constructive change to the current legislation. Greater protection will be provided to financial consumers as a whole under the COFI Bill which is premised on the TCF principles and the protection and interest of financial consumers are placed at the forefront. Due to the shift from a once rules-based approach to a principle and outcome based one, the legislature's intention when prescribing the various obligations will need to be met by financial institutions, as well as the desired outcomes and not just a tick-box approach to complying with the rules. Lastly, it's important to note that the Bill has been compiled in such a way that makes it consumer friendly and it's easier to navigate.

While most people are creatures of habit and are opposed to change, the introduction of the COFI Bill will most definitely be beneficial to financial consumers as a whole, and not just those in the short-term insurance industry.



BIBLIOGRAPHY

List of internet sources

1. Unknown “Financial Services Board (South Africa)” 2019 Wikipedia ([https://en.wikipedia.org/wiki/Financial_Services_Board_\(South_Africa\)](https://en.wikipedia.org/wiki/Financial_Services_Board_(South_Africa)) (10-06-2019))
2. Schmulow “Twin Peaks – the Big Bang of SA’s financial industry” 2018 fin24 (<https://www.fin24.com/Opinion/twin-peaks-the-big-bang-of-sas-financial-industry-20180408> (15-06-2019))

List of articles

1. Marele “FSCA Bulletin Quarter 3” 2018/2019
2. Marele “FSCA Bulletin Quarter 4” 2018/2019
3. National Treasury Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill 2018 (www.treasury.gov.za)
4. Singh “Socio-economic impact assessment system” 2018 Department: planning, monitoring and evaluation Republic of South Africa

List of legislation and regulations

1. Banks Act 94 of 1990
2. Conduct of Financial Institutions Bill 2018 – draft
3. Consumer Protection Act 68 of 2008
4. Financial Advisory and Intermediary services Act 37 of 2002
5. Financial Sector Regulation Act 9 of 2017
6. Financial Service Act 37 of 2002
7. Financial Services Board Act 97 of 1990
8. General Code of Conduct for Authorised Financial Service Providers and Representatives 2003
9. Insurance Act 27 of 1943

10. Insurance Act 18 of 2017
11. Long-term Insurance Act 52 of 1998
12. Short-Term Insurance Act 53 of 1998
13. Policyholder Protection Rules (Long-term Insurance) as published in the Government Notice 1407 of 15 December 2017 and as amended by Government notice 997 of 28 September 2018.
14. Policyholder Protection Rules (Shor-term Insurance) as published in the Government Notice 1433 of 15 December 2017 and as amended by Government notice 997 of 28 September 2018.

List of textbooks

1. Millard and Hattingh *The FAIS Act Explained* (2d ed)
2. Du Toit and Hugo *Annual Banking Law Update 2019* (unpublished)

